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Jeffrey Schoenblum

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MULTIJURISDICTIONAL ESTATES AND ARTICLE II OF THE UNIFORM PROBATE CODE

*Jeffrey A. Schoenblum**

INTRODUCTION

The prefatory note¹ to the 1990 revisions of article II of the Uniform Probate Code ("UPC")² indicates that the changes wrought are a response to several developments since the promulgation of the UPC in 1969. The prefatory note emphasizes the decline of formalism, the proliferation of will substitutes, the multiple-marriage society, and the rise of the partnership/marital sharing theory as stimulative of the revisions introduced.³ The theme of this article is that one other crucial development has been essentially ignored. No serious attempt has yet been made by the drafters to address the immensely complex yet commonplace issues associated with, and being generated by, the unprecedented geographic mobility of individuals and their ability, in a world of rapid communications and decreasing constraints on investment, to own property in more than one jurisdiction. While the UPC is a masterful work of law reform, the issues raised by the increasingly peripatetic nature of individuals and their capital requires the most careful attention. If the UPC is to be fully relevant in the future in facilitating the proper disposition of and determination of rights in property, it must take a more active role in the burgeoning effort to provide a viable legal framework for multijurisdictional wealth transfer.⁴

* Professor of Law, Vanderbilt University School of Law.

¹ See UNIF. PROB. CODE ("U.P.C.") art. II, prefatory note (1991).

² Article II of the UPC, prior to its revision, can be found at 8 U.L.A. 53 (1983).

³ U.P.C. art. II, prefatory note (1991).

⁴ For other works in this area, see, e.g., INTERNATIONAL ESTATE PLANNING: PRINCIPLES AND STRATEGIES (Donald D. Kozusko & Jeffrey A. Schoenblum eds., 1991); ROBERT C. LAWRENCE III, INTERNATIONAL TAX AND ESTATE PLANNING (2d ed. 1989); WILLIAM H. NEWTON, III, INTERNATIONAL ESTATE PLANNING (1981 & Supp. 1992); JEFFREY A. SCHOENBLUM, MULTISTATE AND MULTINATIONAL ESTATE PLANNING (1982 & Supp. 1992).

I. THE LOCAL ORIENTATION OF AMERICAN ESTATE LAWYERS, THE ECONOMICS OF ESTATE PRACTICE, AND THE ETHOS OF THE UPC

The reforms introduced by the 1990 revisions to article II are of great significance. Nevertheless, the preoccupation with such issues as payable-on-death accounts,⁵ antilapse,⁶ and ademption,⁷ when contrasted with the virtual absence of concern with multijurisdictional issues, requires an explanation. In this author's view, at least part of the explanation lies in the fundamental parochialism of American estate practice. Unlike certain other areas of legal practice, wealth transfer in the United States is an area of law and policy almost wholly the domain of the states.⁸ Within the states, "probate practice" is centered typically in local probate courts.⁹ Those engaged in "probate practice" are typically single or small firm practitioners, and this work represents one of the routine, reliable foundations of their general practices.¹⁰

There is a vital practice-economics dimension as well. Few attorneys are members of more than one or two state bars. Resolving multijurisdictional issues may require consulting with out-of-state counsel regarding the law of a foreign jurisdiction. Estate practice will not necessarily permit shifting these costs to the consumer.¹¹ Moreover, there is a substantial opportunity cost incurred, to the extent that the form-oriented, efficient, assembly-line production of wills and other dispositive instruments is impeded by more intricate and sui generis issues.

A further relevant factor is the intellectual focus of estates lawyers. Their concern is with statutory and case law directly addressing wealth transfer and its taxation. The multijurisdictional dimension fundamentally concerns jurisdiction and choice of law, matters left to conflicts scholars and proceduralists. Conflicts scholars and proceduralists are more concerned with a coherent theory for choice of law or jurisdiction that cuts across several fields of law, and are not especially sensitive to the particular history, traditions, and stan-

⁵ U.P.C. § 2-706 (1991).

⁶ *Id.* § 2-603.

⁷ *Id.* § 2-606.

⁸ See generally U.P.C. art. II, pt. 10 prefatory note (1991).

⁹ See, e.g., U.P.C. § 3-201(a) (1991).

¹⁰ See, e.g., *The Role of the Probate Lawyer in a Changing Environment*, 22 REAL PROP. PROB. & TR. J. 753, 760 (1987) (Report of the Probate & Trust Division Task Force on the Changing Role of Probate Lawyers).

¹¹ See, e.g., Geoffrey C. Hazard, Jr. et al., *Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. REV. 1084, 1092, 1101, 1104 (1983).

dards associated with estate practice. They also tend to minimize values such as predictability and fulfillment of the expectations of the wealth transferor.¹² Principles such as the effectuation of testamentary intent do not command the same respect as does the methodology of selecting the proper governing law.

The nature of the uniform laws process by which estate law is reformed further entrenches the geographic and intellectual parochialism of American estate lawyers. Rather than a "national probate code," a model law is presented that can then be enacted by the various states.¹³ On the one hand, this approach reinforces the tendency to regard wealth transfer law as the exclusive domain of the individual states. On the other hand, the masterful quality of the UPC supports the argument for its adoption throughout the country. As with other "uniform" laws, the underlying assumption is that over time the adoption by all the states will lead to a modern, uniform law throughout the country. Too great attention to multijurisdictional concerns would belie this assumption and reveal a lack of confidence in the universal adoption or inherent quality of the UPC. After all, if all states adopt the UPC and apply it in essentially the same manner there will be little need, at least in the case of wholly American estates, to be concerned with multijurisdictional issues. Thus, underlying any serious effort to address, for example, questions of choice of law, is the unpalatable admission that the UPC is not a "uniform" law twenty-three years after its adoption and is not likely to be so in the foreseeable future.¹⁴

II. WILL FORMALITIES

One area in which multijurisdictional issues commonly arise is will formalities. A will may be *executed* consistent with the law of one

¹² See generally Jeffrey Schoenblum, *Choice of Law and Succession to Wealth: A Critical Analysis of the Hague Convention on Succession to Decedents' Estates*, 32 VA. J. INT'L L. 83, 101 (1991).

¹³ The debate over a model law or direct enactment approach has also raged in the international arena. See, e.g., René David, *The International Unification of Private Law*, in 2 INT'L ENCYCLOPEDIA OF COMP. L. (The Legal Systems of the World: Their Comparison and Unification) ch. 5, at 3 (René David ed., 1971); KURT H. NADELMANN, *Uniform Legislation Versus International Conventions as a Method of Unification of Private International Law*, in CONFLICT OF LAWS: INTERNATIONAL AND INTERSTATE 87 (1972); KURT H. NADELMANN, *Uniform Legislation Versus International Conventions Revisited*, in CONFLICT OF LAWS: INTERNATIONAL AND INTERSTATE 141 (1972).

¹⁴ Fifteen states have enacted the UPC. However, in some states only parts of the UPC have been enacted. See 8 U.L.A. 1 (Supp. 1992) (listing the states that have adopted the UPC at least in part).

jurisdiction, but *offered for probate* in another. The UPC addresses the matter, but not in a theoretically consistent fashion. UPC section 2-502 requires a will to be in writing,¹⁵ signed by the testator or in the testator's name at his direction,¹⁶ and by two witnesses.¹⁷ The section also recognizes holographic wills, if signed by the testator and if the material portions of the document are in the testator's handwriting.¹⁸

UPC section 2-503 provides that under certain circumstances, a document or addition to a document that does not comply fully with section 2-502 will, nevertheless, be recognized as a valid will. This is the case when "the proponent . . . establishes by clear and convincing evidence that the decedent intended the document or writing to constitute . . . the decedent's will."¹⁹ This provision adopts the compelling argument made by Professor John Langbein that harmless error should not impede the effectuation of a testator's testamentary intent.²⁰ However, as is noted in the comment following section 2-503, "[t]he larger the departure from Section 2-502 formality, the harder it will be to satisfy the court that the instrument reflects the testator's intent."²¹

The very sensitive and sensible balance struck by sections 2-502 and 2-503 is not reflected in the UPC's approach when a document from another jurisdiction is before a UPC-state court. Pursuant to section 2-506, a written will is valid, though not executed in compliance with sections 2-502 or 2-503,

if its execution complies with the law at the time of execution of the place where the will is executed, or of the law of the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode, or is a national.²²

This provision is consistent with the trend in many states to recognize a will as formally valid so long as it is valid under the laws of some jurisdiction with which the testator had a specified connection at the time of execution or death. However, many states do not go as

¹⁵ U.P.C. § 2-502(a)(1) (1991).

¹⁶ *Id.* § 2-502(a)(2).

¹⁷ *Id.* § 2-502(a)(3).

¹⁸ *Id.* § 2-502(b).

¹⁹ *Id.* § 2-503.

²⁰ See, e.g., John H. Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1 (1987); John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489 (1975).

²¹ See U.P.C. § 2-503 cmt. (1991).

²² *Id.* § 2-506.

far as the UPC.²³ To the extent that they do, such provisions suffer from an absence of critical analysis of the choice of law problem and its relation to the state's own minimal requirements for validation of a dispositive document. Indeed, in contrast to many other aspects of the UPC, section 2-506 does not withstand critical analysis and should be revised.

The most striking flaw in section 2-506 is that it conflicts directly with sections 2-502 and 2-503. Those sections are designed to do away with rules that permit minor technical deviations or other harmless error to invalidate a will that would effectuate testamentary intent. Still, pursuant to section 2-503, proponents are required to proffer "clear and convincing evidence" of that intent.²⁴ As an example of the foregoing, consider a domiciliary of a UPC state who has not executed a will in conformity with section 2-502, and no *clear*

²³ The following is a listing of these states. A will is formally valid if valid under the law of a state indicated in the parentheses following the complete statutory citation: ARK. CODE ANN. § 28-25-105 (Michie 1987) (Arkansas, domicile at death or at time of execution); CONN. GEN. STAT. ANN. § 45a-251 (West Supp. 1992) (Connecticut, place of execution); District of Columbia (no provision); FLA. STAT. ANN. § 732.502(2) (West 1976 & Supp. 1992) (in the case of a nonresident, place "where the testator was at the time of execution"); GA. CODE ANN. §§ 53-3-42 and 53-3-43 (1982) (Georgia for Georgia-situs real property, domicile at death for Georgia-situs personal property); ILL. ANN. STAT. ch. 110 ½, para. 7-1 (Smith-Hurd 1978) (Illinois, place of execution, place of domicile at time of execution); IOWA CODE ANN. § 633.283 (West 1992) (Iowa, place of execution, domicile of testator); KY. REV. STAT. ANN. § 394.120 (Baldwin 1984 & Supp. 1990) (domicile at death); LA. REV. STAT. ANN. § 9:2401 (West 1991) (Louisiana, place of execution, domicile at time of execution); MD. EST. & TRUSTS CODE ANN. § 4-104 (1991) (Maryland, place where executed, testator's domicile); MASS. GEN. LAWS ANN. ch. 191, § 5 (West 1981) (Massachusetts, place where executed, testator's domicile); Mississippi (no provision); NEV. REV. STAT. ANN. § 133.080 (Michie 1986) (Nevada, place of execution, testator's domicile); N.H. REV. STAT. ANN. § 551:5 (1974) (New Hampshire, place of execution); North Carolina (no provision); Ohio (no provision); OKLA. STAT. ANN. tit. 84, § 71 (West 1991) (Oklahoma, place of execution, domicile at time of execution); 20 PA. CONS. STAT. ANN. § 2504.1 (1974) (Pennsylvania, domicile at execution or death); S.C. CODE ANN. § 62-2-505 (Law. Co-op. 1987 & Supp. 1991) (South Carolina, place of execution, testator's domicile); S.D. CODIFIED LAWS ANN. § 29-2-10 (1984) (South Dakota, place of execution, testator's domicile); TENN. CODE ANN. § 32-1-107 (1984) (Tennessee, place of execution, domicile at time of execution); Texas (no provision); VT. STAT. ANN. tit. 14, § 112 (1989) (Vermont, place of execution, domicile); VA. CODE ANN. § 64.1-53 (Michie 1991) (no provision for real property, domicile at death with regard to personal property); W. VA. CODE § 41-1-5 (1982) (no provision for real property, domicile at death with regard to personal property); WIS. STAT. ANN. § 853.05 (West 1991) (Wisconsin, place of execution, domicile at time of execution). The foregoing survey includes Florida and South Carolina, two states that have enacted the UPC in part. States that have no provision are likely to follow the common law rule and apply the law of the situs with regard to real property and the law of the domicile at death with regard to personal property. See 1 SCHOENBLUM, *supra* note 4, §§ 14.02-14.03. States not listed above have enacted the UPC.

²⁴ U.P.C. § 2-503 (1991). Under § 2-506, however, a document could be probated, even though it did not conform to the UPC formalities of execution and even though there was not clear and convincing evidence that it reflected the testator's intent.

and *convincing* evidence exists that the domiciliary intended the instrument to be her will. If the instrument was executed consistently with the formalities of the non-UPC state in which it was executed, section 2-506 would require its probate. However, another domiciliary of the same UPC state, who had signed the document in-state, would not be entitled to have his will probated.

There is no apparent reason why the state in which a person signs an instrument should determine whether it is reliable enough to be probated. Likewise, if a domiciliary of a UPC state has an "abode"²⁵ in a non-UPC jurisdiction that does not compel observance of even minimal UPC formalities, that individual's writing will be probatable if valid in the jurisdiction in which the abode is situated. The same is not true for a domiciliary who may not have or even be able to afford a place of abode in the other jurisdiction.²⁶ Section 2-506 actually goes further. Even if two persons have their sole abodes in a UPC state and execute their wills there, one who is a national of a country that does not insist on UPC standards would die with a probatable will, if it met the lower standards of that country. That would not be the case for a national of the United States.²⁷

The connection that a person has or had with a particular jurisdiction does not respond to the concern whether sufficient formalities have been observed or whether there is clear and convincing evidence, despite nonobservance of formalities, that the writing mirrors the testator's intent. Section 2-506's reliance upon connections with particular jurisdictions, rather than the policies manifest in sections 2-502 and 2-503, seems grounded in protection of expectations. The comment following section 2-506 states that the "purpose of this section is to provide a wide opportunity for validation of expectations of testators."²⁸ In other words, a testator who executes a will in conformity with the laws of his domiciliary state X, but happens to die

²⁵ This term is not defined in the UPC. Although it has been used in tax treaties, there is little law as to the meaning of the term in the context of succession or even choice of law. The term is sometimes used in connection with the term "habitual residence." The comparativist Ernst Cohn once described another term, "closest connection," as "less than 'habitual residence' but more than mere 'abode,'" and ultimately concluded that "[a]ll this is disputed." ERNST J. COHN, *MANUAL OF GERMAN LAW* § 8.12 (2d ed. 1971). The meaning of the more commonly used term, "habitual residence" is also greatly disputed. See Schoenblum, *supra* note 12, at 106-09.

²⁶ He is also less likely to be able to afford quality legal counsel to assure the proper execution of a will.

²⁷ Although nationality is not defined for UPC purposes, it makes little sense as used in § 2-506 with reference to a United States national, since there is no national wills law in the United States. See also *infra* note 34.

²⁸ See U.P.C. § 2-506 cmt. (1991).

domiciled in state Y, which has more stringent formalities, should not be penalized simply because he failed to re-execute his will. The protection of expectations is a legitimate objective. However, if a premise underlying the UPC is that only documents with certain minimal formalities or clear and convincing evidence of intent are reliable enough to permit probate, there is no justification for allowing the probate of an instrument that does not meet these standards.

At bottom, the choice of law rule of section 2-506 strongly suggests a lack of serious regard for the rules and processes of validation set forth in sections 2-502 and 2-503. If a UPC state must probate a writing that is valid elsewhere, despite its failure to satisfy minimal UPC criteria, there seems little reason to employ those criteria at all. As matters stand, the local standard is delegitimized by the choice of law rule.²⁹

Moreover, the notion that "expectations" are being fulfilled by the choice of law rule is clearly incorrect. Section 2-506 requires no showing of reliance by the testator on some other law as a condition of validating a writing that otherwise fails to meet minimal UPC standards. Furthermore, there may be a considerable difference between a testator's intent and expectations. The legal meaning of "expectations," and the methodology for ascertaining it, is murky and is certainly not developed by the UPC. Indeed, section 2-506 anticipates no presentation of evidence as to expectations, as section 2-503 does with regard to testamentary intent.³⁰

Section 2-506 may, nonetheless, be justifiable on some other ground, thus necessitating only a revision in the explanation currently offered in the comment rather than a revision in the section itself.³¹ In fact, there is a choice of law rationale in the multistate context. The laws and the probate processes of the states are so similar that any imagined risks are far outweighed by the efficiency of the system assured by a liberal choice of law rule that eliminates insub-

²⁹ The argument could be made that the forum-situs state has no interest in preventing fraud in its courts when a citizen of another state is involved. See, e.g., Moffatt Hancock, *Equitable Conversion and the Land Taboo in Conflict of Laws*, 17 STAN. L. REV. 1095, 1099-1100 (1965); see also RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 439-40 (3d ed. 1986). But see *infra* note 35. Less clear is whether the situs state should defer when a transfer of local real property is involved and the connection with another jurisdiction is simply that the testator had an "abode" there. See generally *supra* note 25.

³⁰ For example, the comment following UPC § 2-503 discusses the burden of proof and clearly states that it is on "the proponent of a defective instrument" and that the proponent must "discharge that burden by clear and convincing evidence (which courts at the trial and appellate levels are urged to police with rigor)" U.P.C. § 2-503 cmt. (1991).

³¹ See *id.*

stantial challenges.³² A barrier to individual and capital mobility is eradicated.

This justification for bypassing the formalities of sections 2-502 and 2-503, whatever its merits domestically, is certainly not persuasive in the international sphere.³³ In some jurisdictions, fraud is rampant and legal processes are pervasively corrupt. American courts are not likely to be able to ascertain the circumstances surrounding the execution of a foreign will. Further, there are any number of legal systems entirely alien to our own. These may be premised on social norms and cultural or ecclesiastical rules that have no relation to the objectives or concerns motivating the UPC's approach to formalities of execution.³⁴ To incorporate these as part of our own model law by an indiscriminate choice of law provision makes little sense, at least if the drafters are truly serious about observance of certain minimal formalities.³⁵ Underlying the approach of section 2-506 is an assumption that all countries have equally sophisticated, similarly oriented legal systems that function so as to assure, through a writing, the establishment of a testator's intent. This is a most naive and also chauvinistic perspective.³⁶

No doubt, there is an interest in fostering comity in the international legal arena. That is, the argument might be presented that in

³² See, e.g., WEINTRAUB, *supra* note 29, at 439-40.

³³ Drawing a distinction between choice of law rules in the interstate and international contexts has been supported by a number of leading scholars. See, e.g., Albert A. Ehrenzweig, *Interstate and International Conflicts Law: A Plea for Segregation*, 41 MINN. L. REV. 717 (1957); Peter Hay, *International Versus Interstate Conflicts Law in the United States*, 35 RABELS ZEITSCHRIFT 429, 471-77, 485 (1971).

³⁴ UPC § 2-506 simply assumes that a foreign country will have a national wills law, even though the United States itself does not have one. See *supra* note 27. Thus, it refers to the law of the place of which the testator "is a national." Suppose the testator is a national of a country that has no national law, such as Canada. Alternatively, the law of a province might be considered, just as a state of the United States might be, although the matter is not addressed, nor is it clear which state or province would be chosen. Likewise, an ambiguity exists with regard to the law of a country that determines rights and imposes rules based on religious or tribal affiliation. This would be true of much of Africa and Asia. See, e.g., 1 SCHOENBLUM, *supra* note 4, § 18.05, at 672 (discussing India).

³⁵ Indeed, the argument can be made that the UPC ought not be concerned with protecting the interest of certain classes of persons, such as aliens. See WEINTRAUB, *supra* note 29, at 400, 439-40. On the other hand, an alien who owns property in this country at death should be entitled to the same protections against fraud and forgery as is a citizen or domiciliary. Indeed, the UPC has already endorsed this view in a related context, by assuring elective share rights to an alien surviving spouse whose deceased spouse was a domiciliary. See U.P.C. § 2-201(c) (1991).

³⁶ Note that the Hague Conference on Private International Law has refused to extend its membership worldwide because of the lack of sophistication of certain legal systems or because the systems, in theory or practice, are abhorrent to the current membership. See DAVID, *supra* note 13, ¶ 376, at 143.

order to assure the recognition of American wills abroad, American states ought to recognize foreign wills, even though they may be unsatisfactorily executed by UPC standards. This argument has the virtue of explaining UPC section 2-506, even if it otherwise seems at odds with sections 2-502 and 2-503. If comity is the goal, that goal ought to be acknowledged candidly. Moreover, if this is the case, then section 2-506 ought to require evidence that the foreign country is reciprocating. UPC standards should not be abandoned until this has been established reliably.³⁷

Several technical aspects of section 2-506 are also quite troubling. First, it refers to the "law" of certain specified places. There is no indication whether this means the local law or the whole law, including choice of law rules. In contrast, UPC section 2-703, which addresses choice of law as to substantive issues, refers to the "local law." The issue is important, because a will may not be valid, for example, under the local law of the domicile, but would be valid under the law of another jurisdiction to which the law of the domicile makes reference. A second and related issue is what law determines such preliminary issues as domicile,³⁸ nationality, place of execution, abode, and whether local or whole law is intended.

UPC section 2-506 fails as well to address the revocation of a will. Pursuant to section 2-507, a will may be revoked by a subsequent will that revokes it explicitly or implicitly by inconsistency. It may also be revoked by certain revocatory acts, if performed with the intent and purpose of revoking the will. Section 2-506 relates only to the execution of a will and does not apply to revocation. There is no choice of law provision as to revocation and associated matters in the UPC. In fact, the comment following current section 2-506 takes no note of this issue.³⁹ In contrast, the comment to pre-1990 section 2-506 did address the matter. In that earlier comment, the drafters stated that, "[a] similar provision relating to choice of law [for revocation] . . . was considered but was not included. Revocation [sic] by subsequent instruments are covered. Revocations by act, other than partial revocations, do not cause much difficulty in regard to choice of laws."⁴⁰

³⁷ There is presently no empirical data on this point with regard to states that have adopted UPC § 2-506 or a similar provision.

³⁸ The concept of domicile differs considerably from one country to another. See 1 SCHOENBLUM, *supra* note 4, § 9.02.

³⁹ See U.P.C. § 2-506 cmt. (1991).

⁴⁰ U.P.C. § 2-506 cmt. (1969).

The significance of the redaction of this comment is unclear. It could reflect a realization that revocation by act is a more complicated matter in choice of law than was first appreciated, and cannot be addressed in a casual manner. In light of the clear link between execution and revocation, the choice of law dimension ought to be addressed in conjunction with execution.

Moreover, numerous instances can be presented demonstrating the inadequacy of section 2-506 for validating revocations by subsequent written instrument. For example, an individual executes a will consistently with the formalities of section 2-502. Following his death a writing is presented that is typed and signed, in accordance with country Z law, by another person. The writing disposes of the individual's entire estate. There ought to be concern here that a valid will under the UPC can be overridden by a writing that does not meet UPC standards. Furthermore, the interest of validating the party's expectations may be defeated rather than accomplished.⁴¹

The foregoing example suggests an additional point. Section 2-506 does not recognize dispositions that are not in writing, no matter how reliable the proof is.⁴² A foreign country may recognize an oral testament, while requiring a substantial degree of proof. A second country may give effect to a written instrument that may not be a reliable indicator of the testator's intent. It is submitted that the first should be preferred over the second. The mere fact that the second is a writing is irrelevant, unless the incorrect assumption is made that a writing qua writing satisfies a level of reliability in a way that other forms for establishing testator's intent cannot. Furthermore, the spirit of article II is one of validation. If clear and convincing proof exists, there is no reason why the UPC should stand in the way, at least where the testator is a domiciliary of the other jurisdiction and movable assets are involved.⁴³

Of course, the only sort of writing that meets the requirements of section 2-506 is a "written will."⁴⁴ A "will" is defined in section 1-201(56) as a "codicil and any testamentary instrument."⁴⁵ As the prefatory note to article II states, will substitutes and other inter vivos transfers represent "a major, if not the major, form of wealth

⁴¹ In this regard, see *supra* text accompanying notes 28-30.

⁴² See WEINTRAUB, *supra* note 29, at 439, for a general discussion of this issue in the context of nuncupative wills.

⁴³ But see *supra* note 29, for a different result when the connection with the other country or its interest in the estate is less substantial and when the property is local real property.

⁴⁴ U.P.C. § 2-506 (1991).

⁴⁵ *Id.* § 1-201(56).

transmission”⁴⁶ Rules of construction have been incorporated into article II, part 7 that apply equally to wills and other “governing” instruments.⁴⁷ With regard to multijurisdictional transfers, section 2-703 addresses questions of choice of law as to meaning and effect of a governing instrument, will or otherwise.⁴⁸ Despite this effort at an integrated approach to wills and other dispositive instruments, no choice of law rule is presented with regard to the formalities of execution or revocation of these nontestamentary instruments.

Article VI of the UPC sets forth the formal requirements of various nonprobate instruments.⁴⁹ No provision exists for validating a nonprobate transfer instrument that does not comply with these requirements, even though it is in writing and in compliance with the requirements of another jurisdiction. The limitation of section 2-506 to “written will[s]” is entirely out of keeping with the UPC’s integrative approach and the recognition of the importance of these other documents as dispositive instruments.⁵⁰ If a dispositive, testamentary writing valid under foreign law is valid in a UPC state, there is no persuasive reason why a “nontestamentary” instrument accomplishing essentially the same purpose should not be. On the other hand, if there is concern in the nontestamentary context, there probably should be similar concern with regard to written wills.

III. THE INTERNATIONAL WILL—AN INADEQUATE SOLUTION TO THE FORM PROBLEM

Part 10 of article II adopts as part of the UPC, in modified and renumbered form, the provisions of the Convention Providing a Uniform Law on the Form of an International Will (“Convention”), which was a product of the Washington Conference of October 26, 1973.⁵¹ In large part the Convention is intended to provide individuals with multijurisdictional estates a standard form for disposing of wealth, which form will be given recognition around the world.⁵² Only recently, and approximately 18 years after being signed on behalf of the United States, the United States Senate ratified the Conven-

⁴⁶ See U.P.C. art. II, prefatory note (1991).

⁴⁷ See U.P.C. art. II, pt. 7 gen. cmt. (1991) (comment on rules of construction).

⁴⁸ For a discussion of this provision, see *infra* text accompanying notes 132-52.

⁴⁹ U.P.C. art. VI (1991).

⁵⁰ U.P.C. § 2-506 (1991).

⁵¹ The full text of the Convention is republished in the prefatory note to article II, part 10. See U.P.C. art. II, pt. 10 prefatory note (1991).

⁵² See generally *id.*

tion.⁵³ Some, but by no means all, UPC states had previously enacted the UPC version.⁵⁴

A most important point about this Convention is that the ratification process has been handled in a most responsible manner. The diversity of legal regimes around the world and the complex interaction of these regimes when joining in a single set of rules, requires the most careful and extended period of review. The experience with the Convention should serve as a model for other pending conventions that effect substantive aspects of gratuitous transfers.⁵⁵

Most significantly, the Convention shows due respect for the allocation of wealth-transfer matters to the states. While the federal government could almost certainly enter this area of law as a constitutional matter,⁵⁶ this would have enormous consequences from the standpoint of our system of federalism. It would also likely transform estates practice. These concerns have been avoided because the Senate has acted so that each state can decide whether it will enact the provisions of the Convention into its own law.⁵⁷

The great virtue of the "international will" introduced by the Convention is that it eliminates a number of difficult issues inherent in a choice of law provision such as UPC section 2-506. For example, a written will is valid under section 2-506 if executed in accordance with the law of domicile, country of nationality, or place of abode. The sometimes difficult inquiry as to whether a decedent had the requisite affiliation⁵⁸ need not be pursued if an international will is used. Furthermore, the very woodenness of this inquiry into technical affiliation, detached as it is from the fundamental policy of effectuating the testator's intent, is avoided. The often difficult and essentially

⁵³ Ratification occurred on Aug. 2, 1991. *Convention Providing a Uniform Law on the Form of an International Will*, 137 CONG. REC. S12131 (daily ed. Aug. 2, 1991).

⁵⁴ Eight states have adopted part 10 or the freestanding version, designated the Uniform International Wills Act. The relevant statutes are: CAL. PROB. CODE § 6380 (Deering 1991); COLO. REV. STAT. § 15-11-1001 (1987 & Supp. 1991); CONN. GEN. STAT. ANN. § 50a-1 (West Supp. 1992); ILL. ANN. STAT. ch. 110 ½, para. 50 (Smith-Hurd Supp. 1991); MINN. STAT. ANN. § 524.2-1001 (West 1991); MONT. CODE ANN. § 72-2-901 (1991); N.D. CENT. CODE § 30.1-08.2-01 (Supp. 1991); OR. REV. STAT. § 112.232 (1991).

⁵⁵ *E.g.* Hague Conference on Private International Law: Convention on the Law Applicable to Succession to the Estates of Deceased Persons, and Final Act of Sixteenth Session, October 20, 1988, 28 I.L.M. 146 (1989) [hereinafter Hague Conference]; Hague Conference on Private International Law: Convention on the Law Applicable to Trusts and on Their Recognition, and Final Act of the Fifteenth Session, Oct. 20, 1984, 23 I.L.M. 1388 (1984).

⁵⁶ See 1 SCHOENBLUM, *supra* note 4, § 15.05, at 471-72.

⁵⁷ See generally S. REP. NO. 102-9, 102d Cong., 1st Sess. 2 (1991). But see *infra* text accompanying note 96.

⁵⁸ See, *e.g.*, *supra* notes 25, 27, 38. See generally 1 SCHOENBLUM, *supra* note 4, ch. 8 (listing the various factors entering into a determination of domicile).

futile task of determining the substance of the relevant foreign law⁶⁰ and whether it has been complied with is completely obviated. Additionally, the failure of UPC section 2-506 and similar statutory provisions to validate a will on the basis that it is valid at the situs of assets is overcome.⁶⁰

Despite the foregoing, the Convention, as adopted by the UPC, is not without its problems. Some of these are highly technical in nature and, with a few exceptions, will not be addressed here. Others will receive more in-depth scrutiny since they appear to undercut and contradict other provisions of UPC article II.

The first concern that might be raised is that the international will can be used even when there is no international dimension to an estate.⁶¹ In fact, this should not be much of a concern since the international will is actually more demanding from the standpoint of formalities than is required under section 2-502. The will must have two witnesses.⁶² It must be signed by the witnesses and "an authorized person."⁶³ The testator must publish the will⁶⁴ and he must sign or acknowledge it.⁶⁵ If someone else signs the will there must be a notation on the instrument as to the reason why.⁶⁶ The testator, the authorized person, and the witnesses must all sign at the end of the will.⁶⁷ Each sheet of the will must be signed by the testator or his

⁶⁰ For the difficulties associated with proof of foreign law, see, for example, Stephen L. Sass, *Foreign Law in Civil Litigation: A Comparative Survey*, 16 AM. J. COMP. L. 332 (1968); see also, ROBERT LEFLAR ET AL., *AMERICAN CONFLICTS LAW* 356 (4th ed. 1984); Eugene F. Scoles & Peter Hay, *Conflict of Laws* § 12.15 (2d ed. 1992); Sir Otto Kahn-Freund, *General Problems of Private International Law*, 143 RECUEIL DES COURS D'ACADEMIE DE DROIT INTERNATIONAL 440 (1974). See generally Schoenblum, *supra* note 12, at 129-34.

⁶¹ If a testator follows the traditional situs rule with regard to real property, the forum, which is also likely to be the situs state ought to respect compliance with that law, especially if it is its own, as much as it would the law, for example, of the place of abode, whether based on an interests analysis or a connector basis. UPC § 2-506 fails to credit this factor, even though the testator might act on the reasonable expectation that property ought to be disposed of in accordance with the law of the jurisdiction where situated. The importance of testator expectations under the UPC is discussed *supra* text accompanying note 30.

⁶² U.P.C. § 2-1001 cmt. (1991).

⁶³ *Id.* § 2-1003(b).

⁶⁴ *Id.* § 2-1003(e). For a discussion of the authorized person, see *infra* text accompanying notes 93-99.

⁶⁵ U.P.C. § 2-1003(b) (1991).

⁶⁶ *Id.* § 2-1003(c).

⁶⁷ *Id.* § 2-1003(d).

⁶⁸ *Id.* § 2-1004(a). Although stated in mandatory terms, the failure to observe this "requirement" will not invalidate the will. See *id.* § 2-1004(d). The precise status of mandatory provisions that do not invalidate the instrument if not observed is murky. Quoting from the Explanatory Report of the Washington Convention prepared by Jean-Pierre Plantard, the comment to UPC § 2-1004 indicates that the provisions, though "not imposed on pain of invalidity" are "compulsory legal provisions which can involve sanctions, for example, the professional, civil

surrogate and numbered.⁶⁸ The will must bear the date that the authorized person signed it and the date is to be noted at the end of the will by the authorized person,⁶⁹ who is required to ask the testator whether he wishes to make a declaration concerning the safekeeping of the will.⁷⁰ The authorized person is also required to sign and attach a certificate in a specified form, verifying that the required formalities have been observed.⁷¹ The authorized person keeps a copy of the certificate and delivers another copy to the testator, in addition to the one appended to the will.⁷²

As noted, since the formalities required by the Convention are at least as stringent as those called for by UPC section 2-502,⁷³ the use of the international will domestically should present no serious problem. In any event, there would be no point to seek to limit the international will to "international estates," because there would be too great a difficulty in defining what is an international estate.⁷⁴

The principal difficulty with the international will is that it appears to offer more than it actually delivers. Indeed, it may engender undue and dangerous reliance on its provisions. Most notably, it does not guarantee avoidance of "local proof of foreign law," as claimed by the prefatory note to part 10 of UPC article II.⁷⁵ The notion that this instrument can simply be introduced in the forum court and probate will proceed unhindered with respect to local assets is a superficial misconception of how the international will is likely to work.

Presently, if a party seeks to introduce a will that does not comply with UPC sections 2-502 or 2-503, but does meet foreign standards pursuant to section 2-506, the will should be admitted to probate. There may be an *ex parte* procedure or one with limited notice in which a representation is made as to foreign law.⁷⁶ This method of

and even criminal liability of the authorized person, according to the provisions of the law from which he derives his authority." *Id.* § 2-1004 cmt. (quotation marks omitted).

⁶⁸ U.P.C. § 2-1004(a) (1991). This provision, though mandatory, does not result in invalidity. *See supra* note 67.

⁶⁹ U.P.C. § 2-1004(b) (1991). This provision, though mandatory, does not result in invalidity. *See supra* note 67.

⁷⁰ U.P.C. § 2-1004(c) (1991). This provision, though mandatory, does not result in invalidity. *See supra* note 67.

⁷¹ U.P.C. § 2-1005 (1991). Under UPC § 2-1006, failure to attach the prescribed certificate will not invalidate the will. *See also supra* note 67.

⁷² U.P.C. § 2-1005 (1991).

⁷³ *See supra* text accompanying notes 15-18.

⁷⁴ In this regard, *see supra* note 33 and *infra* text accompanying notes 175-77. *See also* U.P.C. § 2-1001 cmt. (1991).

⁷⁵ *See* U.P.C. art. II, pt. 10 prefatory note (1991).

⁷⁶ *See, e.g.,* U.P.C. § 3-301 (1991) (relating to informal probate).

validating a foreign will is no more onerous than the steps that would be required if an international will were submitted for probate. In fact, the international will cannot be validated if certain of its numerous technical requirements have not been observed.⁷⁷ The document will have to be reviewed by the court to assure compliance.⁷⁸

Of course, there may be a will contest by those who would take if the will is invalidated. If one contention is that the formalities of the relevant foreign law have not been observed, there will be an argument over the content of that law and proof will have to be received on this point. The international will is advertised as bypassing this proof process. As noted, however, there will have to be proof as to compliance with the Convention itself. Indeed, UPC section 2-1008 clearly anticipates controversies regarding interpretation and application of the Convention.⁷⁹ However, in resolving these controversies forum law alone is not to be considered. Rather, local probate judges are to recognize the international character of the provisions and "to work towards elaborating a sort of common caselaw, taking account of the foreign legal systems which provide the foundation for the Uniform Law and the decisions handed down on the same text by the courts of other countries."⁸⁰ Furthermore, practicing lawyers are not to interpret "the Uniform Law solely in terms of the principles of their respective internal law, as this would prejudice the international unification being sought after."⁸¹

As difficult as it may be currently to prove foreign law, there is at least a set of legal rules from the pertinent jurisdiction. In the case of the international will, there is, apparently, to be no such particularized frame of reference. Rather, section 2-1008 would seem to impose an affirmative duty upon practicing attorneys and judges to ascertain decisional law in other foreign jurisdictions regarding the interna-

⁷⁷ See *supra* text accompanying notes 62-66 for the requirements that must be observed.

⁷⁸ In this regard, article III of the UPC dealing with probate, ought to be revised to take account of the International Will. For example, UPC § 3-303(c) provides that a "will which appears to have the required signature and which contains an attestation clause showing that requirements of execution under Section 2-502, 2-503 or 2-506 have been met shall be probated without further proof." U.P.C. § 3-303(c) (1991). Reference should also be made to the requirements of UPC § 2-1003 in the case of an international will.

⁷⁹ The comment to UPC § 2-1005 specifically asks: "May an international will be contested?" U.P.C. § 2-1005 cmt. (1991). The answer offered, in relevant part, is in the affirmative: "Contests based on failure to follow mandatory requirements of execution are not precluded" *Id.*

⁸⁰ *Id.* § 2-1008 cmt. (quotation marks omitted). Section 2-1008 actually states, "In interpreting and applying this Act [Part], regard shall be had to its international origin and to the need for uniformity in its interpretation." *Id.*

⁸¹ *Id.*

tional will.⁸² Left unanswered by this provision are a series of questions, including the following:

(1) If the attorneys fail to inform the court of these foreign decisions, must the judge independently determine their existence and holdings?

(2) Assuming there is no clearinghouse for such decisions, how will a local probate judge determine their existence?

(3) If the decisions are not in English, who will translate them from a variety of foreign languages?⁸³

(4) Must a decision of a lower foreign court be followed or can the court ignore decisions on appeal?

(5) Can the local American probate court base a decision on its view of what a foreign high court will decide?

(6) How is a local American probate judge to grasp the significance of decisions rendered in the contexts of several entirely different legal systems?⁸⁴

(7) Must the local American probate court follow earlier foreign decisions or can it disagree with them altogether, even if the foreign decisions are uniform?

(8) Can a local decision be appealed on the ground that it fails to foster international uniformity based on foreign decisions, even if its construction of the law appears to be correct by American standards?

(9) If the international will is being employed in an entirely domestic estate context, must the local American probate court still give effect to foreign decisions?

In addition to these proof of foreign law issues under section 2-1008, difficulties are likely to arise as well under UPC section 2-1006. A certification process is specified and it is to be "conclusive of the formal validity of the instrument as a will under this Act."⁸⁵ However, this statement is prefaced by the statement, "[i]n the absence of evidence to the contrary."⁸⁶ Thus, any international will, de-

⁸² See *id.*

⁸³ Note that the international will need not be in English. U.P.C. § 2-1003(a) (1991). Thus, the will may have to be translated before a determination can be made whether it complies with all requirements. The parties may disagree on the translation of the will as well as on the translation of foreign decisions.

⁸⁴ Recent legal scholarship raises serious questions about the predilections and biases judges bring to the adjudicatory process on the domestic scene, as well as emphasizing the considerable disagreement that exists regarding statutory interpretation. See, e.g., Symposium, *A Re-evaluation of the Canons of Statutory Interpretation*, 45 VAND. L. REV. 528 (1992). Without consensus in this country, how can a judge be expected to make a sound judgment as to the significance of or even understand a diversity of foreign decisions?

⁸⁵ U.P.C. § 2-1006 (1991).

⁸⁶ *Id.*

spite its certification, would be subject to challenge precisely like any other will.⁸⁷ Certainly, this would be true of all challenges based on nonformal grounds. It would also be true of certain, but by no means all, challenges based on nonobservance of formalities.⁸⁸ While the signatures of the testator and witnesses are explicitly not subject to challenge, that of the authorized person would be, as would his various affirmations in the certificate.⁸⁹

Thus, again the purported certainty accompanying reliance on the international will is more ephemeral than first appears to be the case. Still, this does not mean the international will will fail. Minor deviations from the prescribed form of certificate, however, are permitted.⁹⁰ Even if there are more substantial flaws established, it will not be fatal, since the certificate is not required.⁹¹ Moreover, even if one of the "mandatory" formalities set forth in section 2-1003 is not met, thereby invalidating the instrument as an international will, section 2-1002(b) recognizes that it might still be established as a valid will under the local law of the forum.

Apart from challenges on technical grounds, reliance upon the Convention could prove fruitless until it becomes widely accepted in-

⁸⁷ See U.P.C. § 2-1005 cmt. (1991).

⁸⁸ See *id.*

⁸⁹ Although not incorporated into the text of part 10 of the UPC, article VI of the Convention is referred to in the comment to UPC § 2-1005. See U.P.C. § 2-1005 cmt. (1991). Article VI states that the signature of the testator, witnesses, and authorized person, "shall be exempt from any legalization or like formality." *Id.* On the other hand, article VI(2) states that a country may "satisfy themselves as to the authenticity of the signature of the authorized person" and "the prohibition against legalization would not preclude additional proof of genuineness if evidence tending to show forgery is introduced." *Id.* The precise impact of article VI, as well as certain other provisions of the Convention, is not clear. To the extent these provisions are not incorporated into part 10, and there is no explicit language to this effect in the UPC, they should, perhaps, not be enforced. On the other hand, it appears the intention of the UPC drafters was to enact the entire Convention. As a result of the United States ratification, a state could adopt the Convention itself. Alternatively, it might just enact the UPC, or just enact certain portions of the Convention or the UPC version independent of the federal enactment. For example, it is unclear whether article VI is part of the law of a state that enacted the provisions set forth in part 10, but did not even reprint, as part of the enactment, the Convention or the UPC comments referring to the Convention. See also *infra* notes 104-05, 110.

⁹⁰ See U.P.C. § 2-1005 cmt. (1991). The comment states, however, that this should not be read "as authorizing him to depart from this form; it only serves to allow for small changes of detail which might be useful in the interests of improving its comprehensibility or presentation." *Id.* (quotation marks omitted). Moreover, all 14 particulars of the certificate must be included. "The 14 particulars indicated on the certificate are numbered. These numbers must be reproduced on each certificate . . ." *Id.* (quotation marks omitted).

⁹¹ See U.P.C. § 2-1006 (1991). On the other hand, in this situation "proof that the formalities prescribed on pain of invalidity have been carried out will have to be produced in accordance with the legal procedures applicable in each State which has adopted the Uniform Law." U.P.C. § 2-1006 cmt. (1991).

ternationally. A UPC state will have to give effect to an international will when a foreigner resorts to it. Yet, there will be no assurance that a citizen of the UPC state will be entitled to have the same recognition accorded her international will with regard to the passage of property situated in a foreign country. The foreign country, or province or state therein, may not be a party to the Convention. Furthermore, even if it is a party, its judiciary may interpret the Convention differently or be subject to local influences or public policy concerns that block its enforcement.⁹²

Central to the international will is the role of the "authorized person." Each jurisdiction is to designate who may act "in its territory" as the "authorized person,"⁹³ the person charged with supervising the ceremony and executing the certificate that accompanies the will.⁹⁴ Thus, an American executing an international will in Paris would have to use an authorized person under French law, not under American law. A Californian would have to use an authorized person under Oregon law, if executing the will in Oregon. This represents no real advance over the present situation—currently, a foreign executed will would typically require the retention of the services of a local attorney or notary. Indeed, UPC section 2-1009 would limit persons in any state of the United States who can be authorized persons to members of the local bar "in good standing as active law practitioners."⁹⁵ It is uncertain whether this is intended to exclude certain members of the bar otherwise allowed to practice, but not doing so on an "active"

⁹² As of October 20, 1992, the countries in which the Convention has entered into force are Belgium, several Canadian provinces, Cyprus, Ecuador, Italy, Libya, Niger, Portugal, and Yugoslavia.

Note that the law of the country of the authorized person may be controlling on certain issues, rather than the internal law of the forum or the specific rules of the Convention itself. For example, if the authorized person's law requires safekeeping of the will, this "national law" must be observed, even though the Convention does not require it. See U.P.C. § 2-1004(c) & cmt. (1991).

⁹³ U.P.C. art. II, pt. 10 prefatory note (1991) (quoting article III of the Washington Convention). Part 10 of the UPC itself does not make such provision. However, it seems to be incorporated by reference in the comment to UPC § 2-1005. See *id.* § 2-1005 cmt.

⁹⁴ See, e.g., U.P.C. §§ 2-1003(b), 2-1004(a), (c), 2-1005 (1991).

⁹⁵ This provision is, presumably, included in accordance with article III of the Convention, permitting each contracting party to designate the authorized persons in its territory. The Convention, itself, does not limit authorized persons to attorneys. The Report of the Committee on Foreign Relations, reporting favorably on the Senate's advice and consent to ratification, anticipates a phase during which individual states "will have to subscribe by their own legislation to a 'Uniform International Wills Act' [enacted by Congress] and will need to designate an 'authorized person as described in the Convention.'" S. REP. NO. 9, 102d Cong., 1st Sess. 2 (1991).

basis. Furthermore, it is not clear that paralegals⁹⁶ or other persons, though not lawyers, could be authorized persons. Nothing in the Convention bars a foreign country from permitting such persons or even unskilled individuals from performing the role of authorized persons.⁹⁷

In addition to local bar members, section 2-1001(2) provides that the United States may appoint as authorized persons "members of the diplomatic and consular service of the United States designated by Foreign Service Regulations."⁹⁸ This provision is quite misleading. It fails to take account of article II(1) of the Convention itself, which limits the exercise of such authority to cases where local law permits this.⁹⁹ Thus, before an American can execute an international will before an American consular officer in a foreign country, he will have to confirm that the foreign country permits these persons to serve as authorized persons on its territory. Formal confirmation of this authority will be critical, since the question of proper authorization at execution may be raised years later at the time of the testator's death.

In addition to confirming the approval of the authorized person by the place of execution, confirmation will have to be obtained that the United States has authorized consular officials to perform this role and has registered their status as authorized persons with the State

⁹⁶ See, e.g., U.P.C. art. II, pt. 10 prefatory note (1991) (recognizing the possibility of paralegals serving as authorized persons). The State Department has expressed concern "about the attendant burden on the U.S. as Depositary Government, of receiving, keeping up to date, and interpreting to foreign governments the results of fifty different state licensing systems." S. REP. NO. 102-9, 102d Cong., 1st Sess. 2 (1991). Nevertheless, the Senate Report recommending advice and consent to ratification anticipates 50 distinct designations. *Id.* This represents an implicit repudiation of the UPC position by the Senate. The comment to UPC § 2-1001 explains that the reference in UPC § 2-1001(2) to authorized persons empowered "by the laws of the United States" anticipates that "Congress, pursuant to the obligation of the Convention, will enact the annexed uniform law and include therein some designation, possibly of a cadre only, of authorized persons." U.P.C. § 2-1001 cmt. (1991).

A distinction must be drawn between a state's power to refuse to subscribe to a Uniform International Wills Act or designate an authorized person on the one hand and a state's obligation to probate an international will from another jurisdiction. As a result of implementing legislation to be enacted by Congress, there will be provision "for the recognition of international wills throughout the United States." S. REP. NO. 102-9, 102d Cong., 1st Sess. 2 (1991). See generally David Quam, *The Resurgence of the International Will* 25-29 (unpublished manuscript on file with the *Albany Law Review*). This will constitute a federal intrusion into an area historically reserved to the states, as reflected in the state statutes cited *supra* note 23.

⁹⁷ See *supra* note 93. However, see the comment to UPC § 2-1003, which quotes from the explanatory report, in which the author of the report states that the authorized person "will necessarily be a practicing lawyer." U.P.C. § 2-1003 cmt. (1991).

⁹⁸ U.P.C. § 2-1001(2) (1991).

⁹⁹ See U.P.C. art. II, pt. 10 prefatory note (1991) (article II of the Convention).

Department, the depositary for the Convention.¹⁰⁰ The same is true of authorized persons approved by foreign governments. It is unclear whether reliance can be placed on an "authorized person" if the State Department has not been notified or if the person's authority has been withdrawn, but the State Department has not been informed.¹⁰¹

The problem for the nonresident alien is particularly acute. Before a Frenchman, for example, can execute an international will in New York under the auspices of a French consular officer, he must not only confirm that this authority is on record in Washington, but that the state of New York has also approved this exercise of authority. That is to say, "local law" determines whether a foreign official can serve as an authorized person and local law would, presumably, mean the individual enacting state and not the United States, although the question is not free from doubt. Of course, a foreigner would also face the problem of nonrecognition with respect to property in states that have not enacted the terms of the Convention. Moreover, even some of those states adopting the Convention may not recognize foreign officials as authorized persons.

There are other problems with the international will as well. It appears to expose practitioners to considerable risk of liability. One aspect of this has already been noted, in that practitioners must be aware of foreign law in construing and advising on the terms of the Convention.¹⁰² Another aspect relates to various formalities, such as dating the will and the testator signing at the end of the document as well as on each page. These are not mandatory in the sense that the will is otherwise invalidated. However, the attorney supervising execution would appear to have responsibility to see that these formalities are observed, at least if he is acting as an unauthorized person. Failure to do so would, in fact, give rise to potential liability.¹⁰³ Others, serving as authorized persons would likewise face liability. Left unanswered is the question why, if the will is valid despite nonobservance of certain formalities, the attorney or other individual

¹⁰⁰ The United States must be notified under article II(2) of the Convention. See also U.P.C. § 2-1006 cmt. (1991) ("[P]ersons interested in local probate of an international will from another country will be enabled to determine from the Department of State whether the official making the certificate in which they are interested had the requisite authority.").

¹⁰¹ See generally 1 SCHOENBLUM, *supra* note 4, § 15.05, at 463-64 (discussion of this issue).

¹⁰² See *supra* text accompanying note 81.

¹⁰³ See U.P.C. § 2-1006 cmt. (1991). The comment to UPC § 2-1006 also quotes from the Convention's Explanatory Report, which declares that the authorized person, who fails to assure compliance with these formalities "would lay himself open to an action based on his professional and civil liability. He could even expose himself to sanctions laid down by his national law." *Id.* Quare as to the measure of damages, since no injury will have been suffered.

acting as an authorized person may be liable for failure to comply with these nonmandatory formalities?

While the international will does not purport to intrude into substantive matters, this is not entirely the case. For example, the qualification of the two witnesses to the international will must be determined under the law of the country designating the authorized person.¹⁰⁴ Thus, an American court would have to determine whether an international will of a foreigner executed abroad had met the substantive witness requirements of the authorized person's country. The international will, in this regard, fails to eliminate the need to refer to foreign law. Furthermore, it actually complicates the process. The law referred to is that of the authorized person, not that of the law of the domicile of the testator or the situs of assets, as would ordinarily be the case on substantive matters. Since qualification of witnesses is a matter of substance and not form, the effect of the Convention is to alter choice of law principles in a way that goes beyond the Convention's stated scope.

The foregoing witness qualification provision may not apply if UPC part 10 is enacted independent of the Convention, since the Convention's article V witness qualification provision is not included in part 10 of the UPC. In light of the recent ratification of the Convention, however, non-UPC states may give effect to the international will by enacting the Convention directly, rather than by simply enacting part 10 of UPC article II. Moreover, even if part 10 of the UPC and not the Convention itself, is enacted, this may nonetheless, be regarded as one implicit incorporation of the terms of the Convention, which is the source. Unfortunately, the matter is far from clear. In the end, a network of differently construed international wills laws may prove to be the unfortunate product of efforts to overcome the

¹⁰⁴ This requirement is in article V of the Convention itself, but is not reflected directly in part 10 of the UPC. While the Article would appear to apply in UPC states, the matter is not free from doubt. See *supra* note 89. See Kurt Nadelmann, *The Formal Validity of Wills and the Washington Convention 1973: Providing the Form of an International Will*, 22 AM. J. COMP. L. 365, 372 (1974).

If the authorized person is a consular official of the United States, there is no certainty as to which state's law should apply. Alternatively, federal rules could be adopted, although this was not suggested by the Senate Committee on Foreign Relations. See S. REP. NO. 9, 102d Cong., 1st Sess. 2 (1991). Likewise, suppose the consular officials are from a country that does not require witnesses to a will. See 1 SCHOENBLUM, *supra* note 4, § 15.05, at 465. No satisfactory solutions to these problems have been presented. One author has simply proposed bypassing normal legislative processes and having the Foreign Office or State Department of a particular country give instructions as to qualification of witnesses. See Richard D. Kearney, *The International Wills Convention*, 18 INT'L LAW. 613, 626 (1984).

current worldwide diversity of requirements regarding formalities by adopting the international will.¹⁰⁵

In striking fashion, the UPC eschews any provision regarding revocation of the international will on the ground that this is a matter relating to substance rather than form.¹⁰⁶ This approach is highly unfortunate, since it impairs the utility of the international will. An individual is likely to execute more than one will prior to his death. Yet, section 2-1007 simply states that the "international will shall be subject to the ordinary rules of revocation of wills."¹⁰⁷ It does not state which jurisdiction's law of revocation governs; nor whether that revocation will be recognized in all jurisdictions giving effect to the international will. In light of the significance of the authorized person and the determination of witness qualification under *his* law, the conclusion might be drawn that the law of the authorized person should control revocation. On the other hand, the traditional, unsettled choice of law rules that generally focus on domicile and situs might be deemed controlling.¹⁰⁸ The key point is that there is little appeal to executing a form of will when uncertainty shrouds the law governing its revocation. Even though the Convention does not address revocation, part 10 of the UPC could and should do so. A precise procedure consistent with will execution formalities must be adopted if the international will is to receive wide use.

The curious failure to address the revocation issue is paralleled by an inexplicable lack of concern regarding the authenticity of the testator's signature. Under both the Convention¹⁰⁹ and, apparently, part 10 of article II,¹¹⁰ no challenge can be mounted to the authenticity of

¹⁰⁵ At least five different wills regimes can be envisioned: (1) states that adhere to the traditional choice of law rules; (2) states that adopt a more expansive approach like UPC § 2-506, but do not adopt the Convention; (3) states that adopt the Convention; (4) states that adopt the UPC part 10 version, without adopting the Convention; (5) states that adopt the UPC version and the Convention. Among the states adopting the Convention in some form, there may also be a diversity of approach in terms of permissible authorized persons named.

The relationship of UPC part 10 to the articles of the Convention not explicitly embodied in the UPC sections constituting part 10 is left particularly unclear. *See supra* note 89. While the comments accompanying the provisions of part 10 indicate its derivative character, nowhere do they actually incorporate the provisions of the Convention proper. Yet, the Annex of the Convention, which has been reshaped into UPC part 10, hinges on these important articles.

¹⁰⁶ *See* U.P.C. § 2-1007 (1991).

¹⁰⁷ *Id.*

¹⁰⁸ *See supra* text accompanying notes 40-41. *See also* 1 SCHOENBLUM, *supra* note 4, at §§ 14.06 & 15.06.4.

¹⁰⁹ U.P.C. art. II, pt. 10 prefatory note (1991) (article VI of the Convention).

¹¹⁰ The situation under part 10 is unclear. There is no explicit prohibition against authentication by the forum. However, the comment to UPC § 2-1005 points out that article VI of the Convention is "relevant" as to whether "a probate court may require additional proof of the

the signature if the authorized person has signed the accompanying certificate. In the international context this is especially troubling, because the standard applied by the United States with regard to attorneys as the only permissible authorized agents is likely to be considerably higher than in certain other countries. Also, verification of authorized agent status in a foreign country will not always be possible, especially years after the fact of execution. Thus, the potential for fraud on the one hand and unending challenges on the other is considerable.¹¹¹ As with so much involving the international will, the aspiration far exceeds the reality of what has been accomplished. At least part 10 can be strengthened so as to afford greater reliability for

genuineness of signatures by testators and witnesses." U.P.C. § 2-1005 cmt. (1991). The comment then quotes from the explanatory report of the Convention regarding the authenticity of the signature of the authorized person. It proceeds to state: "Presumably, the prohibition against legalization would not preclude additional proof of genuineness if evidence tending to show forgery is introduced, but without contrary proof, the certificate proves the will." *Id.* This quoted passage seems to be referring to authenticating the authorized person's signature, not the other signatures. However, it is quite ambiguous. The statutory or Convention authority permitting challenging even the authorized person's signature is also uncertain, since no such provision appears in the Convention itself.

¹¹¹ The signature on the international will need not be that of the testator. An authorized person can sign, as long as he notes the incapacity "and the reasons therefor" on the certificate. U.P.C. § 2-1003(d) (1991). If the legal system of the authorized person permits it, a third person can sign for the testator. In this case, the authorized person is simply to note this fact on the certificate. The "source of this signature" need not be explained, although the authorized person must still indicate the reason for the testator's failure to sign. *See id.* § 2-1003 cmt. For a general critique of the signature provisions, see Clifford Hall, *Towards a Uniform Law of Wills: The Washington Convention 1973*, 23 INT'L & COMP. L.Q. 851, 859 (1974). *But see* Kearney, *supra* note 103, at 623 (dismissing concerns about the signature requirements; the author, Ambassador Richard D. Kearney, served as the president of the Washington Conference). When the list of countries where the Convention has entered into force is considered, *see supra* note 92, this author believes that there is ample reason to have some concern regarding the reliability of the signatures on the instrument.

Issues may also be raised due to the fact that the international will can be in a language other than that of the testator. *See* U.P.C. § 2-1003 cmt. (1991) ("It will be noted that the Uniform Law does not even require the will to be written in a language known by the testator."). The comment assures that this poses no risk since the testator will know the contents of the international will pursuant to articles 4 and 10 of the Annex to the Convention. UPC §§ 2-1003(b), 2-1005. However, the first of these provisions simply requires a declaration by the testator in the presence of witnesses that the document is his will and he knows the contents. The second provision relates to the certificate attached by the authorized person. Neither provision assures actual knowledge by the testator of the contents of his foreign language will.

Furthermore, the requirement of publication, UPC § 2-1003(b), is unclear. For example, it is uncertain whether the witnesses and authorized person have to sign in each other's presence. The meaning of "presence" is left unsettled, as is what will qualify as an appropriate acknowledgement if the will has previously been signed. *See generally* 1 SCHOENBLUM, *supra* note 4, § 15.05, at 466-467 & n.24; Hall, *supra* note 111.

those resorting to it, unlike the Convention itself, which may not be revised piecemeal.¹¹²

IV. SUBSTANTIVE CHOICE OF LAW RULES

A most striking omission in the revision of article II is the failure to address issues of choice of law in a comprehensive manner. As noted earlier,¹¹³ this may be ascribable to the aspiration for a uniform body of law adopted nationwide, thereby obviating the need for concern over choice of law. Still, an ambitious project such as the UPC ought to devise rules that can mediate conflicts with regard to wealth connected to more than one jurisdiction in the period prior to its hoped for nationwide adoption. This is all the more important, since there is no expectation that the UPC will achieve worldwide application. Thus, international conflicts will persist.

At present, courts in UPC states appear to be falling back on traditional choice of law rules in resolving conflicts.¹¹⁴ In the absence of specific provisions, this is the inevitable consequence of UPC section 1-301, which makes the Code applicable to domiciliaries of the state, property of nonresidents located in the state, and trusts subject to administration in the state.¹¹⁵ Even among UPC states there may be differences in construction of provisions that call for a resolution of a conflict of laws.

One approach for the UPC would be to follow the model of a number of states that have legislated relatively straightforward choice of law rules. New York affords one such example of this.¹¹⁶ Most recently, Louisiana has enacted a comprehensive set of provisions.¹¹⁷

To date, the UPC has addressed these issues on a piecemeal and disjointed basis. A leading example of this approach is the treatment of the elective share. The revised part 2 of article II fails to take

¹¹² See art. II, pt. 10 prefatory note (1991) (Convention article VIII).

¹¹³ See text accompanying *supra* note 13.

¹¹⁴ See, e.g., *In re Estate of Wimbush*, 587 P.2d 796, 799 (Colo. Ct. App. 1978); *In re Estate of Swanson*, 397 So. 2d 465, 466 (Fla. Dist. Ct. App. 1981); *In re Estate of Allen*, 772 P.2d 297, 298 (Mont. 1989).

¹¹⁵ Once jurisdiction is asserted, a court has to decide whether to apply its local law or that of another jurisdiction. UPC courts have looked, as other courts have, to traditional rules of domicile law for personal property and situs law for real property. See cases listed *supra* note 114.

Apart from this failure to address the choice of law problem, the lack of precision in drafting is apparent. For example, § 1-301, dealing with the territorial application of the UPC, draws a contrast between domiciliaries and "nonresidents," rather than "domiciliaries" and "nondomiciliaries." See U.P.C. § 1-301 (1991).

¹¹⁶ N.Y. EST. POWERS & TRUSTS LAW § 3-5.1 (McKinney 1981).

¹¹⁷ LA. CIV. CODE ANN. arts. 3528-3534 (West Supp. 1992).

account of the fact that elective-share property may well be situated in more than one state or country and may be owned in some jurisdictions in a form other than outright.

UPC section 2-201(a) specifically provides that "[t]he surviving spouse of a decedent who dies domiciled in this State has a right of election."¹¹⁸ Section 2-201(c) is a corollary provision that provides that the right of a nondomiciliary decedent's spouse is to be determined by the law of the decedent's domicile.¹¹⁹ Other than these two provisions, there are none that address issues of the multijurisdictional estate. The accompanying comments also fail to consider the issue.

To the extent that real property is situated outside of a UPC-state, there is a great likelihood that the situs state or foreign country will not defer to the UPC domiciliary state.¹²⁰ Nevertheless, the computation of the augmented estate under section 2-202 will be based on all assets, "wherever situated,"¹²¹ even though many of them will be unreachable. This will have the unfortunate effect of imposing a harsh burden on those nonspouse beneficiaries entitled to assets that happen to be situated in the domiciliary state or some compliant third state, since the spouse's share will have to be funded from their assets that otherwise would have been transferred to them.

Another fundamental issue that deserves attention is whether wooden reliance on the domicile law by the UPC is justified. There is no evidence that any extensive consideration was given to this choice of law rule, the assumption, apparently, being made that the domicile of the decedent, as the center of his interests, should absolutely determine rights in his property worldwide. Suppose, however, that only the surviving spouse is a domiciliary of a UPC state, but the decedent was not. In this case, there would not seem to be a basis for the UPC state providing the surviving spouse with an elective share out of locally situated property of the decedent. Yet, the state in which the surviving spouse is domiciled would seem to have a strong interest in assuring her welfare and effectuating its policies regarding,

¹¹⁸ U.P.C. § 2-201(a) (1991).

¹¹⁹ *Id.* § 2-201(c).

¹²⁰ As a constitutional matter, the state in which property is located at the death of the owner has jurisdiction over that property. *See, e.g., Shaffer v. Heitner*, 433 U.S. 186, 208 (1977). It could choose to apply its own law, as is typically the case. In general, the choice of law is constitutionally permissible as long as it is "neither arbitrary nor fundamentally unfair." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981); *see also Phillips Petrol. Co. v. Shutts*, 472 U.S. 797 (1985).

¹²¹ *See, e.g., U.P.C. § 2-202(a)(1)(iv), (b)(2)* (1991).

for example, the partnership theory of marriage¹²² or, alternatively, the support theory of marriage¹²³ recognized by the UPC. The decedent's assets in the state should be available to carry out these policies.

In the typical case, of course, the spouses will be domiciled in the same state. However, the duration of their domicile, perhaps, ought to be relevant, just as the length of their marriage now is for determining the amount of the elective share.¹²⁴ For example, if all property was acquired while in a state that does not adhere to the UPC system of election and the decedent lived in the UPC state for only a few months, there seems less basis for imposing the UPC regime. It would generally counteract the parties' expectations and would impose a severe penalty on the decedent for moving to the state shortly before death. The case for the elective share would be especially weak if the surviving spouse were to return to the original marital domicile. In the somewhat analogous situation of a move between common law and community property states,¹²⁵ the character of the property is preserved. Thus, when a couple retires, for example, to Arizona, their rights with regard to a lifetime of acquired property are not suddenly transformed.¹²⁶

Section 2-201 is also troubling. Under this provision, if a nondomiciliary resident of a UPC state dies owning property in the state, his *nondomiciliary*, resident surviving spouse would have no protection under the UPC. Yet, if a policy behind the elective share provision is the marital partnership or support theory, that state policy should not necessarily be limited to domiciliaries. The widow may continue to reside in the state. By not providing protection to her through the elective share, the state may ultimately be forced to bear the costs of her support.¹²⁷

¹²² This theory, one of the two theories underlying revision of the elective share provisions, reflects a view of marriage as an economic partnership and is tied to the length of the marriage. See U.P.C. art. II, pt. 2 gen. cmt. (1991).

¹²³ This theory, the second one supporting revision of the UPC elective share provisions, reflects the view that a spouse has a duty to support the surviving spouse even after the first spouse's death. See *id.*

¹²⁴ See U.P.C. § 2-201(a) (1991).

¹²⁵ Of course, community property gives a spouse more during marriage than the inchoate property right associated with the right of election at death.

¹²⁶ See generally 1 SCHOENBLUM, *supra* note 4, at §§ 10.14.2 & 10.14.3. But see the examples of California and Idaho, which have enacted "quasi-community" property regimes to afford some protection to a surviving spouse from a common law property state. CAL. PROB. CODE § 101 (Deering 1991); IDAHO CODE § 15-2-201 (1979).

¹²⁷ For example, state welfare and medicaid eligibility typically turns on "permanent" residence or simply "residence." See, e.g., TENN. STAT. ANN. § 71-3-103 (Michie 1987 & Supp. 1992)

Indeed, in adopting a domicile rule, the drafters do not appear to have given a great deal of consideration to alternatives. The power over and interest in immovables by the situs state seems to have been ignored completely. Yet, in light of the strength of this rule in American conflicts of law,¹²⁸ it deserves greater consideration, if not acceptance. Moreover, no consideration is given to a broader interests analysis favored in one form or another by many conflicts scholars.¹²⁹ That analysis would seem particularly pertinent here where jurisdictions may differ on the protection to be afforded a spouse and a coherent rationale that transcends wooden rules of affiliation is needed to choose among state policies.

An interests analysis or other creative approach might also come to grips with the choice of law issues raised by the inclusion of testamentary substitutes in the elective share. There has been much controversy, for example, as to the law governing an inter vivos trust, even when established expressly for the purpose of defeating spousal rights.¹³⁰ There is a serious question whether domiciliary policies regarding the elective share should override the law of another state in which a trust was created, the trustee (who holds legal title) is domiciled, and from where the assets are administered. The UPC fails to take account of these controversial conflicts between sovereigns, just as its simplistic distinction in protection of spouses of domiciliaries, but not of nondomiciliaries, is wholly inadequate.

V. GOVERNING LAW CLAUSES

UPC section 2-703 provides that "[t]he meaning and legal effect" of a governing instrument is determined by the "local law" indicated in the instrument.¹³¹ This provision strikes a welcome blow for testamentary freedom. It permits the testator to specify the rules by which his property is to be disposed of regardless of its location. Further consideration reveals, however, that this laudable provision is seriously limited and flawed.

To begin with, the provision only applies to matters of "meaning and legal effect." The comment that follows indicates, perhaps unin-

(aid to dependent children is available only if the child is "residing within this state," that is, "making his home in the state").

¹²⁸ See Schoenblum, *supra* note 12, at 87-88.

¹²⁹ For an overview of this approach to conflicts analysis, see, e.g., SCOLES & HAY, *supra* note 59, at 13-48.

¹³⁰ See generally 1 SCHOENBLUM, *supra* note 4, § 10.11.

¹³¹ U.P.C. § 2-703 (1991).

tentionally, that the provision is to apply to "interpreting" the will or other governing instrument.¹³² "Interpretation" of an instrument does not necessarily present a choice of law issue. For example, the *Second Restatement of Conflicts*, section 240, comment c¹³³ and section 264, comment c¹³⁴ indicate that interpretation involves the meaning of words by consideration of all facts and extrinsic evidence under the forum's own rules of evidence.¹³⁵ It involves a search for the testator's actual intent and, thus, does not implicate a conflict of laws. To the extent interpretation is what section 2-703 is concerned with, the provision accomplishes little, if anything beyond creating confusion.¹³⁶ More likely, the UPC, with its reference to "meaning" intends matters of "construction." That is, if evidence does not reveal testator's intent, the objective meaning assigned by the relevant law is to be applied.

The provision also applies to the "legal effect" of governing instruments.¹³⁷ The meaning of "legal effect" is somewhat obscure. Under the *Second Restatement of Conflicts*, section 240, comment b¹³⁸ and section 264, comment b,¹³⁹ legal effect relates to the consequences of the use of certain words.¹⁴⁰ A classic example is the rule in Shelley's case or the doctrine of worthier title. Far more significant, however, are questions of substantive validity and effect.¹⁴¹ These would in-

¹³² U.P.C. § 2-703 cmt. (1991); see also *infra* note 151.

¹³³ See RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 240 cmt. c (1969).

¹³⁴ See *id.* § 264 cmt. c.

¹³⁵ See generally SCOLES & HAY, *supra* note 59, at 779-80; Richard W. Effland, *Will Construction Under the Uniform Probate Code*, 63 OR. L. REV. 337, 337 n.2 (1984).

¹³⁶ But see N.Y. EST. POWERS & TRUSTS LAW § 3-5.1(a)(6) (McKinney 1981), which essentially equates interpretation with what the *Second Restatement* and most jurisdictions would characterize as "construction" of an instrument.

¹³⁷ U.P.C. § 2-703 (1991). Professor Effland has indicated that a choice of law reference in a will to matters of construction would result in the provision not applying to matters of legal effect under the predecessor to § 2-703, former U.P.C. § 2-602. However, a general reference to governing law would be effective. If correct, precise drafting would be essential to obtain the full benefit of the UPC's choice of law provision. See Effland, *supra* note 135, at 344-45.

¹³⁸ See RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 240 cmt. b (1969).

¹³⁹ See *id.* § 264 cmt. b.

¹⁴⁰ Note that some jurisdictions use the term "effect," rather than "legal effect" to refer to "the legal consequences attributed under the law of a jurisdiction to a valid testamentary disposition." N.Y. EST. POWERS & TRUSTS LAW § 3-5.1(a)(5) (McKinney 1981); see also RESTATEMENT (SECOND) OF CONFLICTS OF LAW, §§ 239, 263 (1969). Thus, matters such as mortmain limitations, lapse provisions, elective share rights, and forced heirship rights would be encompassed by the term.

¹⁴¹ See *supra* note 140 for the distinction between "effect" and "legal effect." Cf. ILL. ANN. STAT. ch. 110 ½, para. 7-6 (Smith-Hurd 1978) (permitting the testator to designate the law impacting on "the validity and effect" of a disposition; the term "effect," rather than "legal effect," is used).

clude topics such as the rule against perpetuities, rules against restraints on alienation and accumulations, elective share rights, forced heirship rights, lapse, and pretermitted heirship. In the international context, it would relate to such underlying questions as whether a trust will be recognized at all as a legal entity.

Under traditional choice of law principles, a governing law clause will be enforced as to substantive validity and effect issues as long as the law chosen has a connection with the jurisdiction designated. This would be especially true of trusts.¹⁴² Section 2-703 does not permit a designation of governing law in this context. It is, thus, quite limited in the freedom of choice that it affords a testator or settlor and may actually be read as narrowing the scope of the transferor's freedom to choose the governing law. It also exerts pressure to recharacterize issues as involving "legal effect" or "meaning" (interpretation), thereby bringing the matter within section 2-703. Thus, it legitimizes the drawing of obscure distinctions in legal classification that should not determine whether an individual can designate the controlling law. The terminology of section 2-703 must be clarified, so that it unambiguously applies to matters of validity and effect.

Section 2-703 is further restricted in that it does not permit a governing law clause to override family protection provisions, specifically the elective share, exempt property, and family allowance. Section 2-703 leaves unaddressed the handling of other family protection provisions on the international plane. Notably, many foreign jurisdictions afford forced heirship rights to children.¹⁴³ Yet, if American states are not prepared to enforce these rights, they should not expect reciprocity, for example, in the case of the elective share.

Section 2-703 also prevents implementation of the governing law clause where it would be violative of a public policy of the forum state. This type of public policy exception to choice of law has been

¹⁴² See, for example, RESTATEMENT (SECOND) OF CONFLICTS OF LAW, §§ 269(b)(i) & 270(a) (1969), relating respectively to testamentary and inter vivos trusts. The trust must have a "substantial relation" to the jurisdiction the law of which has been chosen. Whether such a connection ought to be required has been considered in depth in the context of contracts. See, e.g., DAVID F. CAVERS, *Re-Restating the Conflict of Laws: The Chapter on Contracts*, in *THE CHOICE OF LAW: SELECTED ESSAYS*, 1933-1983, at 59, 72 (1985).

¹⁴³ Under a forced heirship law, children of the testator would be entitled to a share of her estate much as in this country her husband would be entitled under the elective share provision. See generally 1 SCHOENBLUM, *supra* note 4, § 12.02, for a consideration of forced heirship.

In the domestic context, there is also some doubt as to the coverage of the provision. For example, it has been suggested that pretermitted spouse and heir statutes do not override the freedom to choose a governing law, since they are not specifically mentioned as are the other family protection measures. See, e.g., UNIFORM PROBATE CODE PRACTICE MANUAL 155 (R. Wellman ed., 2d ed. 1977); see also Effland, *supra* note 135, at 346.

utterly and devastatingly rejected by modern conflicts of law scholarship.¹⁴⁴ It makes little sense to recognize a public policy exception within the United States, where the laws of the various states simply do not deviate so significantly as to justify denying application of another state's law.¹⁴⁵ The essence of choice of law is a recognition that different states pursue different policies. By allowing the forum to disregard the transferor's choice of governing law simply because the foreign law is inconsistent with forum law is essentially to deny the validity of any governing law clause. At a minimum, it means that the enforceability of such clauses will be entirely unpredictable. Thus, a far narrower exception is all that should be permitted, if there is to be any public policy exception at all, at least, as between states.

The reference in section 2-703 to the "local law of the state selected by the transferor" is also troubling.¹⁴⁶ Traditionally, the choice of a state's law in succession matters has included the whole law of the state, including its own choice of law provisions.¹⁴⁷ Indeed, no limitation to "local law" is imposed when reference is made to the domicile of the testator for elective share purposes under UPC section 2-201. If a testator designates the law of state X and, with regard to the particular matter, state X would look to the situs state Y, then the state Y rule is imposed. By indicating an adoption of state X law, the testator is in effect saying he wants the result that would be reached in state X. UPC section 2-703 represents a major shift. It reflects the very different assumption that when the testator indicates that state X law should govern he means only its local, and not whole law. Yet, this creates an entirely novel result that would not be available under the law of state X itself.¹⁴⁸ There needs to be com-

¹⁴⁴ See David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 183-84 (1933); Ernest G. Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L.J. 736, 747 (1924); Monrad G. Paulsen & Michael I. Sovern, "Public Policy" in the *Conflict of Laws*, 56 COLUM. L. REV. 969, 1016 (1956). See generally WEINTRAUB, *supra* note 29, at 81-85.

¹⁴⁵ See, e.g., Herbert F. Goodrich, *Foreign Facts and Local Fancies*, 25 VA. L. REV. 26, 35 (1938). A further question raised concerns just what constitutes a violation of public policy. In a comment reflecting the uncertainty of the matter, Professor Effland stated: "Most courts would probably hold that local perpetuities law expressed a basic public policy which cannot be avoided." See Effland, *supra* note 135, at 346. Indeed an expansive reading of the public policy exception may be justified in light of the fact that "[t]he purpose of section 2-602 [now § 2-703] is not to facilitate avoidance of local law." *Id.* at 347.

¹⁴⁶ U.P.C. § 2-703 (1991).

¹⁴⁷ See, e.g., RESTATEMENT (SECOND) OF CONFLICTS OF LAWS, §§ 242 cmt. c, 263 cmt. b (1969).

¹⁴⁸ See, e.g., LEFLAR, *supra* note 59, at 11-13; see also Ernest N. Griswold, *Renvoi Revisited*, 51 HARV. L. REV. 1165, 1182 (1938). See generally Schoenblum, *supra* note 12, at 135 & n.219.

ment on this issue and, perhaps, eventually, recognition of a presumption based on the particular language used in the instrument or the absence of particular language from the instrument.

Of course, the reference to "local law" in UPC section 2-703 may simply be an oversight. The "whole law of the state selected," that is, including its choice of law rules, may be what was intended. However, if this is the case, it must be clarified.

Further clarification is also called for with regard to the number of choices of governing law that can be made. Section 2-703 is written as though there can be only a single choice of law.¹⁴⁹ However, *dépeçage*,¹⁵⁰ which would permit the designation of different choices for different issues or different assets, is well-established in American choice of law and is an integral part of sophisticated multijurisdictional planning. UPC section 2-703 does not address this practice, which advances testamentary freedom, a fundamental UPC objective. Having endorsed freedom of choice in principle, the UPC should clearly and explicitly endorse an approach that does not limit choice of governing law to one per instrument.

Notwithstanding the foregoing, UPC section 2-703, as revised, is ambitious in certain respects. First, its scope has been expanded so as to apply to "all governing instruments, not just wills."¹⁵¹ The term "governing instrument" is defined in UPC section 1-201(19) to encompass many nontestamentary instruments. Thus, the governing law clauses covered are not limited to those appearing in wills. UPC section 2-703 is also ambitious in another respect. It applies to domiciliaries as well as nondomiciliaries. In sharp contrast, some state statutes are written in a way that gives effect only to the choice of that state's law by nondomiciliaries. In other words, they are typically applied in the context of ancillary administrations.¹⁵² UPC section 2-703, thus, allows a domiciliary of the forum state to vary the law governing various aspects of his disposition of local assets.

¹⁴⁹ The provision refers to "the local law of the state selected by the transferor" and "that law." U.P.C. § 2-703 (1991).

¹⁵⁰ For a general discussion of *dépeçage* see WILLIAM M. RICHMAN & WILLIAM M. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS 124-26 (1984); see also Schoenblum, *supra* note 12, at 118 n.143, 127-29.

¹⁵¹ Between 1990 and 1991, the language of UPC § 2-703 and the accompanying comment were modified so that reference is now made to "governing instruments" instead of "donative dispositions." The substance of the provision does not appear to have been changed. Compare U.P.C. § 2-703 & cmt. (1990) with U.P.C. § 2-703 & cmt. (1991).

¹⁵² See, e.g., N.Y. EST. POWERS & TRUSTS LAW § 3-5.1(h) (McKinney 1981) ("whenever a testator, not domiciled in this state . . ."); ILL. ANN. STAT. ch. 110 ½, para. 7-6 (Smith-Hurd 1978) ("[i]f a nonresident decedent . . .").

VI. SITUATIONS IN WHICH THERE IS NO GOVERNING LAW CLAUSE

The revision of article II conspicuously fails to consider *any* choice of law issues involving substantive validity and effect, or construction, when there is no governing law clause. There is also no provision relating to capacity to execute a will, create a trust, or enter into any other sanctioned arrangement.

These are glaring omissions. More often than not there will be no governing law clause. Even if there is one in a will or a trust, there is not likely to be one in other "governing instruments."¹⁵³ Thus, the focus of section 2-703 is on an important, but secondary issue. The predominant problem that needs addressing is choice of law when the transferor has not specified a choice. Except in the context of the elective share provisions,¹⁵⁴ article II fails to address the matter. Moreover, as noted, even when the transferor has indicated a preference via a governing law clause, the effect to be given that clause is highly uncertain and potentially restrictive at the present time.¹⁵⁵

VII. THE HAGUE CONVENTION ON SUCCESSION TO DECEDENTS' ESTATES

The Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons,¹⁵⁶ which was finally approved on August 1, 1989, is likely to be presented to the Senate for advice and consent, just as eventually occurred with the Washington Convention providing for an international will form.¹⁵⁷ Although the Hague Convention has been endorsed by several bar groups,¹⁵⁸ it has elicited strong criticism as well.¹⁵⁹ As limited as is the UPC's foray into the area of multijurisdictional estates, the Hague Convention would con-

¹⁵³ See U.P.C. § 1-201(19) (1991) for the scope of the term "governing instruments."

¹⁵⁴ See *id.* § 2-201; see also *supra* text accompanying notes 113-24 for a discussion of choice of law in the elective share context.

¹⁵⁵ See *supra* text accompanying notes 131-49.

¹⁵⁶ See Hague Conference, *supra* note 55, 28 I.L.M. 146.

¹⁵⁷ See *supra* text accompanying note 57.

¹⁵⁸ Among these have been the American Bar Association, the American College of Trust & Estate Counsel, and the International Academy of Estate and Trust Law.

¹⁵⁹ See generally Schoenblum, *supra* note 12. See also Robert C. Lawrence & Marlisa Vinciguerra, *Planning to Protect Against Forced Heirship, Sovereign Acts and Creditors*, in INTERNATIONAL ESTATE PLANNING, *supra* note 4, at 74-81; Peter M. North, *Reform But Not Resolution: General Course on Private International Law*, 220 RECUEIL DES COURS D'ACADEMIE DE DROIT INTERNATIONAL 9, 281-82 (1990); James Pedowitz, Report to the Real Property Division of the Section of Real Property, Probate and Trust Law of the American Bar Association (Sept. 11, 1989); Letter from Henry S. Ziegler, Partner, Sherman & Sterling, to Jeffrey Schoenblum, Chair, International Property, Estate and Trust Law Committee, Real Property

flict dramatically with the philosophy reflected and positions that have, in fact, been taken in article II.

To begin with, the very procedure for enactment of the Hague Convention is open to question. Some effort has been made to have it apply nationally, rather than on a state-by-state basis. This would conflict directly with the very process inherent in a uniform laws approach. It would run counter to the stated policy in the prefatory note to part 10 of article II relating to international wills. In that note, the commentators reject the federalization of wills law by treaty and state that:

One disadvantage of this approach is that it would place a potentially important method for validating wills in federal statutes where probate practitioners, long accustomed to finding the statutes pertinent to their specialty in state compilations, simply would not discover it. Another, of course, relates to more generalized concerns that would attend any move by the federal government into an area of law traditionally reserved to the states.¹⁶⁰

This concern regarding federalization ought to be especially prominent in the case of the Hague Convention. Unlike the Washington Convention, the Hague Convention is not merely prescribing an alternative form of will. Rather, its provisions specify which jurisdiction's law applies to substantive aspects of inheritance. Thus, the Hague Convention will have the effect of determining what substantive law will control the disposition of assets situated in the various states of the United States or in any other signatory's territory.

Apart from the foregoing, the Hague Convention departs significantly from the direction of article II in that it differentiates wills from other dispositive instruments, which are left to traditional, forum choice of law rules.¹⁶¹ This differentiation is in sharp contrast to the revision of UPC section 2-703, which gives effect to governing law clauses in all "governing instruments" and not just those in wills. Indeed, the Hague Convention fails entirely to take account of the wealth transmission revolution and the integrated nature of estate planning.¹⁶²

In other respects, the Hague Convention departs even more dramatically from UPC section 2-703. For example, if an American na-

Probate and Trust Law Section of the American Bar Association (Apr. 10, 1989) (on file with the *Albany Law Review*).

¹⁶⁰ See U.P.C. art. II, pt. 10 prefatory note (1991); see also *supra* text accompanying note 55.

¹⁶¹ Hague Conference, *supra* note 55, arts. 1(2)(c) & 1(2)(d), 28 I.L.M. at 150.

¹⁶² See, e.g., Schoenblum, *supra* note 12, at 96 & n.56.

tional designates the law of a particular state as governing, that designation will only be valid if at some time he was an habitual resident of that state.¹⁶³ In the case of a foreign national designating the law of an American state as governing, he would, generally, have to be a habitual resident at the time of the designation.¹⁶⁴ No such requirements are imposed by UPC section 2-703 or any other provision of the UPC.

Under the Hague Convention, highly formalistic terminology would have to be adhered to in order to assure the validity of a governing law clause. For example, if a single law were designated to govern the entire estate, it could only be the law of habitual residence or nationality at the time of designation or death.¹⁶⁵ On the other hand, if the designation of a law is made to govern the succession "to particular assets in his estate," no such limitation in choice of law would be applied.¹⁶⁶

More generally, the Hague Convention adopts a series of wooden choice of law rules for resolving conflicts. These rules fail to take account of either the contemporary currents in choice of law theory or the interest of predictability that is essential to estate planning. The concept of domicile as the relevant connector, which is the case for the elective share provisions of article II and also for article III of the UPC, is entirely replaced by a complex of connectors largely unfamiliar to American lawyers, including habitual residence, nationality, and the more closely connected jurisdiction.¹⁶⁷

Importantly, the choice of law rules of the Hague Convention do not apply to matters of construction, capacity, administration, or procedure.¹⁶⁸ These matters are reserved for traditional choice of law. Thus, considerable pressure is likely to exist to engage in rigid and artificial characterization of issues so as to obtain one outcome or another depending on whether the Convention or local law controls.

¹⁶³ Hague Convention, *supra* note 55, art. 19(5)(a), 28 I.L.M. at 152.

¹⁶⁴ Hague Convention, *supra* note 55, art. 19(5)(b), 28 I.L.M. at 152; *see also Explanatory Report*, in 2 PROCEEDINGS OF THE SIXTEENTH SESSION OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, cl. 73, at 563 (1990) [hereinafter *Explanatory Report*]. With respect to "mandatory rules," such as family protection provisions, a governing law clause will only be given effect if it designates the law of habitual residence or nationality at the time of designation or death. *See* Hague Conference, *supra* note 55, arts. 5(a), 6, 28 I.L.M. at 150-51.

¹⁶⁵ Hague Conference, *supra* note 55, arts. 3, 5(1), 28 I.L.M. at 150.

¹⁶⁶ Hague Convention, *supra* note 55, art. 6., 28 I.L.M. at 151.

¹⁶⁷ *See* Hague Conference, *supra* note 55, arts. 3(1)-3(3), 28 I.L.M. at 150.

¹⁶⁸ *See* Hague Conference, *supra* note 55, arts. 1(2), 7(2), 28 I.L.M. at 150, 151; *see also Explanatory Report*, *supra* note 164, cl. 37, at 541 & cl. 24, at 535. *See generally* Schoenblum, *supra* note 12, at 89-90 n.29 & 96-97 n.56.

The Hague Convention also eliminates the scission in choice of law between real property and personal property. Some commentators would consider this a positive development.¹⁶⁹ However, recent developments in Europe¹⁷⁰ and the position taken by virtually all states, including UPC states,¹⁷¹ supports the view that the venerable situs rule for real property has broad support. Even critics of an absolute situs rule have recognized that the situs state often does have an interest in the application of its law.¹⁷² Indeed, the Hague Convention on the Law Applicable to Trusts,¹⁷³ which has also been signed by the United States, but not ratified, imposes a choice of law regime that does take into account the situs of assets.¹⁷⁴

The Hague Convention on Decedents Estates is especially flawed in its attempt to draw a distinction between interstate and international estate matters in the case of a federal country such as the United States.¹⁷⁵ In principle, the drawing of this distinction does make sense. As has been noted, the systems of law and inheritance policies of the states resemble each other considerably more than they do those of many foreign countries.¹⁷⁶ The problem with the Hague Convention's approach is that it defines international estate too broadly. A single asset with a foreign situs appears to bring an

¹⁶⁹ See, e.g., Eugene F. Scoles, Comments on Hague Convention on the Law Applicable to Succession to the Estate of Deceased Persons, Memorandum to John Wallace, Director, Probate and Trust Division, Section RPPT, ABA (Sept. 19, 1989).

¹⁷⁰ For example, Germany revised the Introductory Law of its Civil Code, but retained article 28, which defers to the law of the situs of real property if the situs state applies local law. See generally Heinrich Schönfelder, *Einführungsgesetz zum Bürgerlichen Gesetzbuche (EGBGB)*, Deutsche Gesetze (1991); Rainer Gildeggen & Jochen Langbein, *The New Conflict of Laws Code Provisions of the Federal Republic of Germany, Introductory Comment and Translation*, 17 GA. J. INT'L & COMP. L. 229 (1986). A similar respect for the situs is shown in recent enactments by the European Community. See, e.g., European Communities' Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1978 O.J. (L 304); 1988 O.J. (L 319) (extending Convention to non-EC European countries); see also European Communities' Convention on the Law Applicable to Contractual Obligations, 1980 O.J. (L 266). See generally Schoenblum, *supra* note 12, at 87 n.22, 102-04.

¹⁷¹ See, e.g., *supra* note 114 (citing cases).

¹⁷² See, e.g., Schoenblum *supra* note 12, at 90 n.27 (citing authority).

¹⁷³ 23 I.L.M. 1389 (1984).

¹⁷⁴ See, e.g., *id.* art. 12; see also Donald Trautman, *Book Review*, 99 HARV. L. REV. 1101, 1110-11 (1986). See generally Schoenblum, *supra* note 12, at 103 n.76.

¹⁷⁵ Technically, article 1(1) of the Hague Convention applies to "succession to the estates of deceased persons," without limitation. Hague Conference, *supra* note 55, art. 1(1), 28 I.L.M. at 150. However, article 21 provides that "[a] contracting state in which different systems of law or sets of rules of law apply to succession shall not be bound to apply the rules of the Convention to conflicts solely between the laws of such different systems or sets of rules of law." Hague Conference, *supra* note 55, art. 21, 28 I.L.M. at 152. This provision would apply to the United States if it chose to have it apply.

¹⁷⁶ See *supra* notes 32 & 145.

otherwise domestic estate under the Hague Convention,¹⁷⁷ thereby radically transforming the choice of law rules that determine what jurisdiction's law governs. In effect, much, if not all, state wills law would be internationalized and be subject to the terms of the Hague Convention.

One other disturbing aspect of the Hague Convention is its commitment to the enforcement of certain countries' inheritance regimes, even those elements that may be pernicious by American standards. For example, the explanatory report indicates that article 15 permits a signatory country to ignore the otherwise applicable choice of law rules and enforce a system of primogeniture.¹⁷⁸ Thus, United States nationals owning property abroad could be subject to a system of blatant gender discrimination. By incorporating the Hague Convention, as it has the Washington Convention, the UPC would be endorsing a discriminatory structure of rules long since disavowed in policy and law in this country.¹⁷⁹

CONCLUSION

The revision of article II of the UPC fails to address adequately multijurisdictional aspects of gratuitous wealth transfer. The increasing mobility of individuals and the geographic diversity of their estates will not permit the multijurisdictional dimension to be addressed in piecemeal fashion much longer. The parochialism of local estate practice will be forced to take account of the multijurisdictional aspects, if only because of the demands of clients and the liability exposure of attorneys who ignore these aspects.

The UPC ought to be presenting coherent, sensible approaches as it has done with respect to so many other aspects of gratuitous wealth transfer. The disjointed efforts made to date are entirely inad-

¹⁷⁷ *Explanatory Report*, *supra* note 164, cl. 131, at 603 interprets the word "solely" in Article 21, *see supra* note 175, as requiring that not a single asset have a foreign situs.

¹⁷⁸ *See, e.g., Explanatory Report*, *supra* note 164, cl. 110, at 587, wherein the statement is made that "the situs may legislate that with regard to family-owned farms at or under a given size the farm is to devolve as one unit by way of the male line of proprietor."

¹⁷⁹ Constitutional challenges to the Hague Convention could be expected. For example, suppose property is situated in a country discriminating in favor of male inheritance. A parent dies and the property passes to a son. A daughter brings a suit in equity in the United States seeking one-half of all ownership and benefits obtained by the son from the property. The son's defense is the Hague Convention. The son's argument could be repudiated on equal protection or federalism grounds. Of course, the more likely result is that the court would refuse to be bound by article 15 and would assert the public policy exception to the Convention. *See Hague Conference*, *supra* note 55, art. 18, 28 I.L.M. at 152. The relationship of article 15 and article 18 is unclear.

equate. UPC section 2-506 is inconsistent with and actually undercuts the minimal formal and evidentiary requirements set forth in UPC sections 2-502 and 2-503. The international will is awash with problems and fails to provide an adequate and reliable vehicle for bypassing local formalities while assuring with a reasonable degree of certainty that the international will does reflect the testator's intent. The ambitious reach of the elective share provisions give no real consideration to the problems raised by lack of enforcement power across state lines and national frontiers. They also fail to extend application to all those who ought to have claims based on the philosophies now underlying these provisions. The governing law clause, section 2-703, is well-intentioned in seeking to effectuate testamentary freedom. Unfortunately, it is poorly drafted, quite ambiguous, and actually rather circumscribed in terms of the situations when it can be employed. In all other aspects of wealth transmission by will or other instrument, article II is completely silent.

The purpose of this Article is to evaluate revised article II and not to present a comprehensive blueprint for resolving multijurisdictional issues. That blueprint ought to be the product of a careful and deliberate process by those charged with drafting the UPC. However, the time has come for the process to commence. The topic should not be left by default to patchwork, retrograde efforts like the Hague Convention on Decedents' Estates, which in many respects runs counter to basic themes embodied in the UPC.

